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**The Lorge School and Linda Cooperman.** Case 2–CA–37967

February 19, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On August 3, 2007, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>1</sup> findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified<sup>3</sup> and set forth in full below.<sup>4</sup>

<sup>1</sup> The judge admitted into evidence transcripts of secretly made recordings introduced by the General Counsel. The Respondent objected at the hearing, and the judge subsequently concluded that the evidence should not have been admitted. The General Counsel has excepted to the judge's finding that the recordings were improperly admitted. We find it unnecessary to reach this issue because, in agreeing with the judge that Linda Cooperman was unlawfully discharged, we do not rely on the recordings.

<sup>2</sup> The General Counsel and the Respondent have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge concluded that the Respondent violated Sec. 8(a)(1) of the Act by discharging Supervisor Linda Cooperman. We adopt that conclusion, but unlike the judge, we do not rely on the following facts and evidence to show the Respondent's animus: (1) Executive Director Sandra Kasner's comment to Cooperman about her management style; (2) Kasner's failure to turn over the names and addresses of new employees to the Union until she received a written request; and (3) the testimony of Edwin Blowe.

<sup>3</sup> We have modified the judge's recommended Order to require that Linda Cooperman be reinstated to her former position. We have substituted a new notice in conformity with the Order as modified.

<sup>4</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

AMENDED REMEDY

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging Supervisor Linda Cooperman because she refused to assist in causing the resignation or constructive discharges of teachers and Union Representatives Chris Piccigallo and James Rouse, actions that would have constituted unfair labor practices. To remedy this violation, the judge recommended that the Respondent be ordered to cease and desist from this unlawful conduct and to make whole Cooperman for wages and benefits she lost as a result of her discharge. The judge, however, did not recommend that the Respondent be ordered to reinstate Cooperman, observing that it could result in a "dysfunctional management team at the school." Contrary to the judge, we find that Cooperman's reinstatement is the appropriate remedy here.

The purpose of the Board's remedial relief is to restore, as far as possible, the situation that would have obtained but for the wrongful act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Additionally, it is well-settled Board policy to reinstate a supervisor who has been terminated in violation of the Act in order to ameliorate any intimidating effect that the termination had on employees' Section 7 rights. See *Parker-Robb Chevrolet*, 262 NLRB 402, 404 (1982), review denied sub nom. *Automobile Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983) (noting that the justification for reinstatement of a supervisor terminated in violation of the Act "is grounded upon the view that the discharge itself severely impinged on the employees' Section 7 rights"); see also *Professional Medical Transport, Inc.*, 346 NLRB 1290 (2006); *Howard Johnson Motor Lodge*, 261 NLRB 866 (1982), *enfd.* 702 F.2d 1 (1st Cir. 1983).

Here, Cooperman would not have been discharged but for the Respondent's unlawful acts. Therefore, her reinstatement to her prior position is appropriate to restore the status quo. The judge's speculation that "dysfunctional management" might result from reinstating Cooperman is not a legally sufficient basis for departing from the Board's established remedy of reinstating unlawfully discharged supervisors.<sup>5</sup> See, e.g., *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1089 (7th Cir. 1987) ("the company's action in firing [a supervisor] may have cre-

<sup>5</sup> Member Schaumber agrees with his colleague that extant Board law requires Cooperman's reinstatement to remedy the Respondent's unfair labor practice. However, like the judge, he is of the view that this could result in a dysfunctional workplace, and questions the policy that compels Board interference with management decisions regarding high-level supervisors. He applies precedent for institutional reasons for the purpose of deciding this case.

ated bitterness and undermined her loyalty, but if so the company has only itself to blame”).

Cooperman did not engage in any conduct that would preclude her reinstatement. Accordingly, having discriminatorily discharged Cooperman, the Respondent must offer her reinstatement to her former or substantially equivalent position and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, The Lorge School, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any supervisor for refusing to discharge or discipline employees because of their union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Linda Cooperman full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to any rights or privileges previously enjoyed.

(b) Make whole, with interest, Linda Cooperman for any loss of earnings and other benefits suffered as a result of her unlawful discharge, in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Linda Cooperman’s unlawful discharge, and we will within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked “Appendix.” Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2006.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 19, 2008

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any supervisor for refusing to discharge or discipline employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, set out above.

WE WILL offer Linda Cooperman full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to any rights or privileges previously enjoyed.

WE WILL make whole Linda Cooperman for any loss of earnings and other benefits suffered as a result of her unlawful discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Linda Cooperman, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

#### THE LORGE SCHOOL

*Susannah Z. Ringel, Esq.*, for the General Counsel.

*Daniel Silverman, Esq.*, for the Respondent.

*Antonio M. Cavallaro, Esq.*, for the Union.

#### DECISION

##### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York, New York, on 4 days in May and June 2007. The charge and the amended charge were filed on November 8 and December 19, 2006.

The complaint, which was issued on March 30, 2007, alleged that the Respondent discharged Linda Cooperman on August 1, 2006, because she refused to commit unfair labor practices. Specifically, the allegation, as fleshed out at the opening of the hearing, was that the Respondent's Executive Director Deborah Kasner instructed Cooperman to make working conditions so adverse to the Union's representatives, Chris Piccigallo and James Rouse, that they would quit their employment.<sup>1</sup>

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the briefs filed, I hereby make the following findings and conclusions

<sup>1</sup> The charge and the amended charge made it abundantly clear that the allegation was that the Respondent discharged Cooperman because it wanted her to create a "hostile work environment" against union officials and it wanted her to discharge or discipline union representatives. The Respondent moved to dismiss the complaint because it was too vague. I denied this motion because the Respondent was clearly on notice as to the nature of the allegations made against it.

#### FINDINGS AND CONCLUSIONS

##### I. JURISDICTION

The complaint alleges and the answer admits that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

The Lorge School is a publicly funded private school. It is located in a 5-story building in Manhattan and services students from kindergarten to the 12th grade. These are students who have emotional or cognitive difficulties, or both. There are, on average, between 70 to 90 students in the school and the classrooms tend to have 8 to 10 students with a teacher and a teacher assistant assigned to each classroom. In addition, the school employs four social workers and has staff employed to provide security functions.

Reporting to a board of trustees, Deborah Kasner is the executive director. She had previously been employed in a managerial position at the school and was promoted to the position of executive director after competing for that position with various other individuals. Kasner took over the position from Michael Pagliuca who retired. She had started at the Lorge School as a social worker and her training is in social work. Also recently hired as the contract administrator and clinical supervisor was David Osman. This individual had no previous experience at the school and was, during the summer of 2006, a newcomer. In performing his duties, Osman took over that job from Kasner. He was to be responsible for supervising the school's social workers.

Linda Cooperman, the Charging Party, was hired on July 10, 2006, as the instructional supervisor and she replaced Dr. Elaine Dawes who was about to retire. This job was to be in charge of academic instruction and in this capacity she was to be the direct supervisor of the teachers. I note that Cooperman was offered this job after she had applied for the top job that had been given to Kasner. Cooperman had no prior experience at the Lorge School and although she may have had some experience in public schools dealing with difficult children, her background was as a teacher and not a social worker. The chairman of the board of trustees is Martha Bernard.

I should note that once Kasner, Osman, and Cooperman were in place, they were the three highest officials at the school. Additionally, Shawn Bradley and Cassandra Pierre were respectively the dean of students and assistant dean of students. Their jobs were to supervise a staff of six crisis interventionists.

Compounding this entire situation, where a whole new managerial staff had been assembled, the State of New York had recently conducted an audit of the school and by July 2006, the managers were aware that there was a good deal of criticism regarding the school's programs. As noted by Kasner, the State report was potentially horrendous because if the school lost its state funding it would be out of business.

In my opinion, all of the people involved in this case were essentially well intentioned individuals who were trying to do a good job in difficult circumstances.

Since 2000, the Lorge School has recognized the United Federation of Teachers in the following unit:

All full-time and regular part-time speech therapists/teachers, school psychologists, social workers, teachers, teaching assistants, crisis interventionists, secretaries and maintenance workers, excluding all other employees, guards and supervisors as defined in the Act.

At the time of the events herein, there was a collective-bargaining agreement that ran from July 1, 2005 to June 30, 2008. That agreement contained grievance and arbitration clauses and it appears from this record that the Union had been fairly aggressive in filing grievances over the years. The UFT chapter leader has been Christopher Piccigallo and James Rouse has been the union delegate. Both teachers had been involved in the organizing campaign and after that campaign was successful, they have both been directly involved in contract negotiations and grievance handling.

The General Counsel contends that there has been a long-standing history of animus by the school's administrators against the Union. But the evidence of alleged conduct before 2006 to support this contention is pretty meager and involved a largely different cast of managers. For example, an employee named Edwin Blowe testified that in June 2006, when he received a warning and was asked by Pagliuca if he wanted union representation, he responded that he did not "deal with the union." (Blowe asserted that he had some kind of dispute with the union representatives.) Blowe testified that Pagliuca then asked why he didn't try to get rid of the union and suggested that if he could get 30 percent of the staff to sign some kind of petition he could accomplish that result. Nevertheless, the evidence on balance, merely indicates that when Blowe stated his displeasure with the Union, he probably was told about the type of procedures that could be followed to get the NLRB to run another election.<sup>2</sup>

Nevertheless, the evidence shows that when Kasner took over as executive director and after Osman was hired as the contract administrator, the climate between management and the Union changed for the worse.

In July 2006, Rouse made a request to Kasner that she provide contact information for all newly hired bargaining unit employees so that he could provide them with information regarding the State's certification requirements. (Teachers ultimately have to be certified and if not already certified need to have a plan to become certified. The contract at article 7, states that the Employer and the Union are equally responsible for bringing certification information to the attention of teachers). Notwithstanding this request for presumptively relevant information, Kasner refused to give Rouse the information. And although the information was ultimately provided, it only happened after Rouse told Kasner that refusing would be a violation of the NLRA and after the Union sent a letter repeating the request on July 27, 2006.

Cooperman testified that on or about July 12 or 13, 2006, while she was talking to Kasner in her office, the latter received

a phone call wherein she was told about two grievances that had been filed on behalf of the two janitors. According to Cooperman, Kasner told her that the previous administration (Pagliuca), had been "soft" on the teachers and had allowed them to control the school. Cooperman asserts that Kasner stated that the previous administrator had made decisions with a view toward avoiding grievances and that she (Kasner), was going to "show them who's boss."

Cooperman testified that later in the day, Kasner received a phone call from Conchetta Diaz, a teaching assistant and that after the call ended, Kasner said that Diaz was crying because Rouse had told her she would be fired at the end of the year unless she got her certification. According to Cooperman, Kasner told her that Rouse was acting outside of his authority and that she also complained that Rouse had tried to deliver some letter that he wrote directing employees to a website relating to teacher certifications.<sup>3</sup> Cooperman testified that Kasner told her she shouldn't trust Rouse; that he wanted their jobs, and that he had created a lot of trouble for the school. According to Cooperman, during this same conversation, Kasner told her that she thought that Chris Piccigallo was an average teacher and that he was fulfilling his ambition to be a school administrator by being a union leader.

According to Cooperman, in or about the third week of July, she was called into Kasner's office alone and was told; "I want you to make it difficult for James and Chris to stay here." Cooperman testified that she asked Kasner if she wanted her to create a hostile work environment for these two teachers and that Kasner said "yes." According to Cooperman, she told Kasner that she could not do this to which Kasner replied that she should be a team player and take direction from the team leader. Cooperman testified that Kasner gave her a copy of the union contract and stated that she "could see it happening all over again."

Kasner denied the assertions by Cooperman, particularly the assertion that she asked Cooperman to make it difficult for Rouse and Piccigallo to continue to work at the school. As to Rouse, Kasner states that she told Cooperman that Rouse needed close supervision (although conceding that he had received very good performance evaluations). As to Piccigallo, Kasner testified that he was one of the better teachers. She denied that she ever got fed up or annoyed with either man because of the way that they handled contract grievances. However, in testifying about an obscure incident involving the availability of a student's IEP, Kasner admits that she might have told Cooperman not to take Piccigallo at face value.

Although there were some differences in the testimony given by the parties' witnesses, there also was a great deal that was agreed upon. However, to the extent that there were crucial differences between Cooperman and Kasner, I am going to credit Cooperman's account. I thought that Cooperman's testimony was detailed, consistent, and straightforward. To the extent possible, her testimony was corroborated by other witnesses. Also, I was favorably impressed with her testimony on demeanor grounds.

<sup>2</sup> Rouse testified that in 2003, he had recommended that a friend be hired and that the dean of students told him that she was not hiring him because of "you and your union crap." Apart from being remote in time, Rouse conceded that when he complained to Pagliuca, then the executive director, the latter agreed to hire his friend.

<sup>3</sup> This would have been protected concerted activity as it was consistent with the terms of the collective-bargaining agreement.

During the brief period that Cooperman worked at the school, she developed a plan to departmentalize the school's classes so that the children from the intermediate and high school grades would go from classroom to classroom and where the teachers would specialize in particular subjects. The evidence is that when Cooperman talked about this idea to Dr. Dawes, the latter was skeptical because of the special needs of the children, which might be disrupted by too much movement from class to class.<sup>4</sup> There is also no doubt that Kasner, when presented with this idea, was also skeptical and was reluctant to implement it.

I must say that with respect to the idea of departmentalization, I do not make any judgment as to which point of view is better. I only note that this was a matter of real dispute between Cooperman and Kasner.

As noted above, Chris Piccigallo made a written request for relevant information on July 27, 2006.

On Friday, July 28, 2006, there was a management meeting attended by Kasner, Cooperman, Osman, and Pierre. Cooperman's recollection of this meeting was that she raised an issue about IEPs and when she mentioned Piccigallo's name, Osman got red in the face and said that if Piccigallo was there he would punch him out. Cooperman states that when she asked what this was all about, Kasner said that there had been a grievance meeting involving the janitors and that Rouse and Piccigallo had walked out because they refused to have the meeting recorded. Cooperman also testified that Kasner said that there had been an argument because Piccigallo had refused to follow Osman's request to take a visiting student into his class and that he viewed this as insubordination. According to Cooperman, after explaining that she, as the teachers' supervisor, would make the assignment if a new child came to visit the school, "they" said that the union leadership was a problem at the school. Cooperman testified:

I'm feeling very uncomfortable because, as the only licensed administrator, you're asking me to go after these guys and I'm not comfortable doing that. And I said that the teachers have to like me. And then, I thought better of the word "like," and I said, "no, they have to trust me." And then, Ms. Pierre said, "No, they have to like you, but you still don't understand. Chris and James have caused a lot of problems at the school, and they really have to go."<sup>5</sup>

At the conclusion of the meeting, Kasner announced that there would be another meeting on Monday, July 31, and that Sandra Kahn, a consultant to the board of trustees would be present.<sup>6</sup>

According to Cooperman, after the meeting ended, she went into Osman's office and asked him why he was so angry. She testified that he said that they were being tested as new administrators and that if Kasner said that they had to go, they had to

go. Cooperman testified that she told Osman about the State report and said that she didn't know how they were going to make progress if all they did at the management meetings was talk about Chris Piccigallo. She also testified that she told Osman that Kasner was not licensed as a school administrator and that she was limited to spending only 25 percent of her time doing administrative work. At this point, according to Cooperman, they weren't getting anywhere in the conversation and she left.

On Monday morning (July 31), Kasner called Cooperman and Osman into her office and asked if Cooperman had told Osman that she (Kasner), was incompetent. (Obviously, Osman had related the conversation that he had with Cooperman on Friday afternoon). Cooperman testified that she denied this assertion and stated that she had merely told Osman that Kasner was not certified to spend all of her time on administrative duties. At this point, according to Cooperman, Kasner asked Osman to leave and said that the changes that Cooperman had been proposing were not going to happen. (The proposed departmentalization plan.) Cooperman states that Kasner ended by saying: "Does that make you want to leave?"

On Tuesday, August 1, 2006, at around 3 p.m., there was a second management meeting. This was attended by Cooperman, Kasner, Osman, Bradley, Pierre, and Dr. Kahn. Cooperman testified that after an initial discussion about reinstating class reviews, Kasner said that there was a member of the leadership team who was willing to take her leadership on everything except for the two union leaders. Cooperman testified that as she understood that Kasner was talking about her, she responded by saying that she felt very uncomfortable about her refusal to create a hostile work environment and not being considered a team player on that account. According to Cooperman, Dr. Kahn said that this is not just what Kasner wanted; that Kasner worked for the board of directors and that the union leadership had not only caused trouble for the school but also had caused a great deal of legal expense. Cooperman testified that Kahn stated that the two union leaders had to go and that her refusal to do this was going to be creating a problem for Kasner.

Cooperman's testimony regarding the August 1 meeting was essentially denied by Dr. Kahn, Osman, and Kasner. But I do note that Dr. Kahn testified that at this or at the earlier management meeting, she recalled that Cooperman, in the context of a discussion about Rouse, stated that she didn't want to be put in the position of creating any kind of hostile environment for him.<sup>7</sup>

Later that day, Cooperman was called into Kasner's office, and in the presence of the bookkeeper, was told that she was fired.

On August 3, 2006, Cooperman sent a letter to Howard Johnson, a trustee, setting forth her position regarding her discharge. This was well before she filed any charge with the NLRB and before she sought any legal counsel. This stated *inter alia*;

<sup>4</sup> Dr. Dawes also testified that she found Cooperman to be self-righteous and overbearing. That may be, but her personal interactions with and opinion of Cooperman had nothing whatsoever to do with Kasner's decision to fire Cooperman.

<sup>5</sup> Pierre was not called as a witness.

<sup>6</sup> The transcript should be corrected to reflect the correct spelling of Dr. Kahn.

<sup>7</sup> Since there were at least two leadership meetings, it is entirely possible that people may have conflated the events that took place on two separate occasions.

As you must already know, Deborah fired me yesterday, August 1, because of personal differences. First, I am writing to express the sadness I feel about not being given the opportunity to achieve the educational objectives for the school that I so clearly outlined during my interviews with the Board. Second, I am asking you to explain why I was invited to work for an individual whose personal goals are to perpetuate the divide between the clinicians and educators and whose stated mission is to transform Lorge into a day treatment center for emotionally disturbed children.

From the outset, Deborah expressed great hostility toward certain members of the teaching staff and asked me to create a hostile work environment that would cause these individuals to leave. I tried to explain to Deborah that I was uncomfortable with executing a vendetta, and as an educational administrator I could only promote the dismissal of teachers on the basis of their incompetence, not their political views. Upon hearing this, Deborah assumed that I was not a team player. She viewed me as insubordinate and continued to create an issue over the matter to the point where she brought pressure on me to resign. Though I resisted and tried to be conciliatory, she was firm in her attitude, which resulted in her firing me without warning or notice.

The General Counsel presented Edwin Blowe who testified that a few days after Cooperman had been fired, he overheard a conversation between Kasner and Martha Bernard that was occurring in an office adjacent to where he was working. Blowe testified that he overheard Kasner saying that Cooperman didn't want to go by her rules and that she wanted to do a lot of things for the school that couldn't happen. Blowe further testified (after some leading), that he heard Kasner say that she wanted to get rid of her headaches and that her headaches were Rouse and Piccigallo.<sup>8</sup>

I note that Blowe's testimony also tended to corroborate the Respondent's argument that there were other issues that were the subject of a nonunion-related dispute between Cooperman and Kasner. Thus, Blowe testified that he heard Kasner say that Cooperman wanted to bring the library up from the basement and that this would cost too much money.

<sup>8</sup> Blowe had been subpoenaed by the General Counsel and had failed to appear. Nevertheless, he subsequently agreed to testify voluntarily and showed up on June 13, 2007. The General Counsel suggests that his reluctance to testify was caused by the fact that his girlfriend was still employed at the school. As noted above, he testified about some conversations that he had with the previous executive director and I concluded that those were essentially innocent. Blowe was also pressed by the General Counsel to testify about some additional statements made by Kasner and Bernard during the overheard conversation, by having him repeat what was contained in his pretrial affidavit. But I will not rely on these additional alleged statements because I don't think he had a present memory of these statements and his affidavit cannot be construed as a past recollection recorded. Nor, despite his reluctance to testify, do I conclude that he was an adverse witness, whose affidavit could be used to prove another alleged conversation that he had with some woman whose name he didn't know but whom he thought was on the board of trustees.

The General Counsel offered further evidence of animus towards Rouse and Piccigallo as union representatives. This was in the form of testimony regarding transactions that occurred after Cooperman's discharge.

In September 2006, there were two grievances filed, one of which involved a directive by Osman to the social workers that they call his cell phone if they were going to be absent. It seems that before the grievance meeting was held, Osman discussed the matter with the social workers outside the presence of the union representatives and that these employees apparently agreed that the new policy was reasonable. When the grievance meeting was held, Rouse and Piccigallo objected to the fact that Osman had discussed the grievance with the individuals without the union being notified or given an opportunity to be involved.<sup>9</sup> Osman for his part, defended his action of holding a staff meeting to discuss the cell phone policy and opined that he was not obligated to deal with Piccigallo or Rouse about the matter. At one point, Osman got angry and asked if he was being accused of doing anything illegal. Rouse responded that what he had done was a violation of the contract whereupon Osman demanded that Rouse show him what in the contract was being violated. At that point, Osman threw the contract at Rouse and hit him with it. Kasner adjourned the meeting.

On May 6, 2007, Rouse and Piccigallo had a meeting with Kasner about a grievance that they filed. This involved a claim for health insurance for a substitute teacher hired by Kasner who the union representatives construed as being in the bargaining unit and therefore covered by the contract. At the meeting, Kasner stated her opinion that she needed to hire a teacher on a temporary basis; that the contract did not prohibit this; and that because this person was not a permanent employee she was not entitled to contract benefits. As the argument escalated, Kasner got angrier and angrier. She stated:

KASNER: You know what? You know what I'm going to do? You guys want to push this? I won't have any temporary teachers, and you guys can figure out how you're going to cover the classes.

PICCIGALLO: Deborah, but that's not the issue.

KASNER: You know what? I'm not discussing it any further. I will tell this lady we're not going to use her anymore and you guys, the two of you, can figure out how we're going to cover those classes. All right?

...

KASNER: I'm not discussing it. I'm not discussing it any further. Now, in terms of this one, you're right. . . . And you know what? My intention was to keep this school cleaner. I wanted to change hours to keep the school cleaner. You guys are getting in the way of my doing things to improve the running of the school, and I resent it and I'm sick of it.

<sup>9</sup> Sec. 9(a) in pertinent part states: "That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect."

ROUSE: That's very unfair.

KASNER: I'm absolutely sick of it.

ROUSE: Very unfair.

KASNER: I don't want to hear from you.<sup>10</sup>

Rouse testified that in April 2007, his Supervisor Barry Malloy told him that he should be careful about handing out union cards to new employees because he was being watched and that what Rouse was doing might be misunderstood. Rouse told Malloy that he didn't understand how giving out union cards to new members could be misunderstood and that Malloy responded by saying something like; "I don't think the new members are going to complain, but it can be questioned."

Rouse also testified that there was an incident in early May 2007, involving what he terms as a false accusation by Osman that he had left the building during working time without permission.<sup>11</sup> Rouse testified that during a conversation he had with Malloy about this incident, he told Malloy that he was being harassed and that this was not the first time that Osman had put something false in writing about Piccigallo and himself. According to Rouse, Malloy said that he sees that Osman is doing this to him; that he sees it as harassment; and that he has tried to deal with Osman about this and has gotten nowhere. Rouse testified that he told Malloy that he really needed him to protect him from Osman's constant harassment and that he needed Malloy's guidance. He states that Malloy responded by saying; "Look avoid the guy as much as possible, but the harassment is not going to stop." According to Rouse, Malloy said that it was deliberate; that it was being directed by Kasner; and that it might stop if Kasner thought that he was going to resign. According to Rouse, Malloy told him that Kasner seemed to be angrier lately and that she was angry about "this NLRB thing."

Malloy, who was called as a witness by the Respondent, was not asked about and did not deny either of the conversations reported by Rouse. His entire testimony was that when he was hired (after Cooperman was fired), he was never asked to harass or create a hostile work environment for Rouse and Piccigallo.

Kasner testified that the reason that she decided to discharge Cooperman was because Cooperman was not, in her opinion, willing to follow Kasner's direction. The main issue was the

question of departmentalization and according to Kasner, she did not agree with Cooperman's proposal that the school should commence this program at the start of the new school year. She testified that the students, particularly those in the middle grades, would not adapt well to going from classroom to classroom during the course of the day. But, according to Kasner, it was not just the disagreement about policy, it was the manner in which Cooperman went behind her back and pushed for her proposal. In this regard, the Respondent points to Cooperman's private conversation with Osman on Friday, July 28, which when reported to Kasner, seems to have been interpreted by her as an accusation by Cooperman that Kasner was not competent to be the executive director. Kasner also testified that at one point, Cooperman stated that unless she was allowed to implement her ideas about departmentalization, she was going to go to the State authorities and report the matter to them.

### III. ANALYSIS

What I want to make clear is that there was a progression from an agreement to work together, to a conflict, to a breakdown, to the point where Mrs. Cooperman made it clear that, for right or wrong, she was not going to take direction from me.

I have no doubt that this testimony by Kasner is true. But it can be interpreted as being favorable to either the General Counsel or the Respondent. Kasner believed that Cooperman had made it clear that she was not going to take direction from her. But the question here is what was the direction that Kasner wanted Cooperman to follow?

There may have been a variety of factors that caused Kasner to discharge Cooperman, all relating to her belief that Cooperman would not take direction from her. The evidence shows that Kasner and Cooperman disagreed about a significant policy matter; namely the question of departmentalization. The evidence shows that Kasner might even have come to the opinion (probably unjustified), that Cooperman was going behind her back and seeking to undermine her authority. Moreover, the initial starting point of these two individuals was precarious because Cooperman had originally applied for the same job that Kasner had just obtained. And human nature being what it is, I can understand why Kasner would be suspicious of Cooperman and view her as a potential rival. Finally, there was it seems to me, a difference in attitude and approach given that Cooperman had an academic background and Kasner had a social work background.

But notwithstanding all of the above, I cannot escape the conclusion that the proximate and predominant reason for Kasner's decision to discharge Cooperman was the latter's unwillingness to make life difficult for and force the resignations of the two union delegates, Rouse and Piccigallo.

The credited evidence in this case shows that when Kasner took over the job of the executive director, she sought to be a strong manager. The evidence convinces me that Kasner believed that the Union stood in the way of allowing her to operate the school in an efficient manner and that the activity of the union's representatives in processing grievances, would be a costly impediment to running the school that way she liked. In this regard, I credit Cooperman's testimony that on July 12 or

<sup>10</sup> Rouse made a number of surreptitious audio recordings including the conversations that occurred during the grievance meetings on September 26, 2006, and May 6, 2007. At the time that the General Counsel offered these recordings into evidence, the Respondent objected based on the fact that the recordings were surreptitiously made. I overruled that objection, assuming that if the recordings were not doctored, they would constitute the most reliable means of ascertaining what took place at those meetings. I later discovered that the Board, as a matter of policy, precludes the introduction of secret recordings made at negotiation sessions. *Triple A Fire Protection*, 315 NLRB 409, 411 (1994). Nevertheless, having taken them in as exhibits and having read the transcripts, it is impossible to close that door after it was opened. I can't order myself to disremember the evidence that was received.

<sup>11</sup> As Rouse teaches music and has the students visit his classroom, he doesn't have to be in his classroom when students are not scheduled to be there. He testified that he has, for a long time and without prior complaint, smoked cigarettes outside the buildings when he had no classes.

13, 2006, as two grievances were being reported to Kasner, the latter said that the previous administration had been “soft” on the teachers; had allowed them to control the school; had made decisions with a view to avoiding grievances; and that she (Kasner) was going to “show them who’s boss.”

This attitude was further evidenced by the fact that Kasner refused two union requests for the names and addresses of new hires and only furnished them after Rouse told her that the refusal was a violation of the NLRA and after Piccigallo made a written request for this information on July 27, 2008.

I credit the testimony of Cooperman regarding the management meeting held on July 28, 2006, where she was explicitly told that, “Chris and James have caused a lot of problems at the school, and they really have to go.”

In addition to the above, the credited testimony of Blowe (the eavesdropper), substantiates the conclusion that the predominant reason for Cooperman’s discharge was because she would not help in ridding Kasner of those meddlesome men. Thus, Blowe testified that he heard Kasner say, among other things, that she wanted to get rid of her headaches and that her headaches were Rouse and Piccigallo.

In *Parker Robb Chevrolet*, 262 NLRB 402 (1982), the Board held that the discharge of a supervisor would only be unlawful if it directly interferes with the rights of non-supervisory employees. The Board stated:

Notwithstanding the general exclusion of supervisors from coverage under the Act, the discharge of a supervisor may violate Section 8(a)(1) in certain circumstances, none of which are present here. Thus, an employer may not discharge a supervisor for giving testimony adverse to an employer’s interest either at an NLRB proceeding or during the processing of an employee’s grievance under the collective-bargaining agreement. Similarly, an employer may not discharge a supervisor for refusing to commit unfair labor practices, or because the supervisor fails to prevent unionization. In all these situations, however, the protection afforded supervisors stems not from any statutory protection inuring to them, but rather from the need to vindicate employees’ exercise of their Section 7 rights.

In the final analysis, the instant case, and indeed all supervisory discharge cases, may be resolved by this analysis: The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers’ interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is not unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.

In *Howard Johnson v NLRB*, 702 F.2d 1, 4 (1st Cir. 1983), the Court upheld the Board’s finding that the employer violated the Act by discharging a supervisor who refused to engage in spying on union activities. Similarly, in *Gerry’s Cash Market Inc. v NLRB*, 602 F.2d 1021 (1st Cir. 1979), the Court agreed

with the Board’s conclusion that the employer violated the Act by demoting a supervisor because he refused to enforce an overly broad no-solicitation rule. See also *Professional Medical Transport*, 346 NLRB 1290 (2006); *Pioneer Hotel, Inc.*, 324 NLRB 918 (1997); *USF Red Star, Inc.*, 330 NLRB 53 (1999).

In the present case, I conclude that the General Counsel has made out a strong case that the Respondent discharged Cooperman because she would not assist Kasner in forcing the resignations of the two union delegates because of their union positions and because of their role in enforcing the terms of the collective-bargaining agreement. In that regard, Cooperman was clearly being asked to commit an unfair labor practice under Section 8(a)(1) and (3) of the Act. Further, having considered all of the evidence, I conclude that the Respondent has not shown that it would have discharged Cooperman for reasons other than her refusal to commit an unfair labor practice. I therefore find that the Respondent’s discharge of Cooperman violated Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. By discharging Linda Cooperman because of her refusal to assist in causing the resignation or constructive discharges of Chris Piccigallo and James Rouse because of their activities as union representatives, the Respondent violated Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

However, because of the peculiar circumstances of this case, I am not going to order the Respondent to reinstate Cooperman.

The Board and the Courts have ordered reinstatement for discharged supervisors. For an extensive discussion of this issue see, for example, *Kenrich Petrochemicals v. NLRB*, 907 F.2d 400 (3d Cir. 1990). The full panel of the Court, with Judge Greenberg dissenting, stated in pertinent part:

[W]e believe, as did the Board in *Advertiser’s Mfg. [Co.]*, 280 NLRB 1185 [(1986)], that the rationale for ordering make whole relief is as strong in circumstances where a supervisor is discharged because of the protective activity of a family member as when a supervisor is discharged for failing to commit an unfair labor practice or for testifying before the Board. In situations where a supervisor has been discharged for failing to commit an unfair labor practice, reinstatement has been justified on the ground that it “dissipate[s] the effects of an unfair labor practice and restore[s] the status quo. . . .” By its very nature, a supervisor’s refusal to commit an unfair labor practice cannot adversely affect the rights of the rank-and-file employees under her control, and reinstatement of the supervisor is not necessary to remedy an unfair labor practice that did not occur. Yet the Board has thought it necessary to reinstate a supervisor fired for this reason in order to ensure



that the firing will not intimidate the employees' future exercise of [S]ection 7 rights. . . .

This however, is not a case of a low-level supervisor who was illegally discharged for refusing to commit an unfair labor practice at the bequest of his or her employer. The Lorge School is a small enterprise where Cooperman was the number two person in relation to Kasner, who was the executive director. And indeed, because Cooperman originally applied for the executive director's job, Kasner viewed her as a potential rival. Further, the evidence shows that there were differences of opinion regarding real and significant policy issues between these two individuals.

Balancing the rights of the employees, who I note have protection via the grievance/arbitration provisions of a contract, as against the obligation of the school to provide services to children with cognitive and emotional problems, I foresee the probability that by reinstating Cooperman to her former position, this would result in a dysfunctional management team at the school.

I will, however, recommend that the Respondent make Cooperman whole for any and all loss of earnings and other benefits from the date of her discharge (August 1, 2006), until such time as she obtains or is offered substantially equivalent employment elsewhere. Backpay should be computed on a quarterly basis from the date of such refusal less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent can cut off backpay by offering Cooperman reinstatement to her old position or to a teacher's position at the same salary and benefits that she had at the time of her discharge.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

#### ORDER

The Respondent, The Lorge School, New York, New York, its officers, agents, and representatives, shall

##### 1. Cease and desist

(a) From discharging any supervisor who refuses to commit actions which would constitute unfair labor practices under the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest, Linda Cooperman for the loss of earnings and benefits from the date of her discharge (August 1, 2006) until such time as she obtains or is offered equivalent employment elsewhere.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Linda Cooperman

and within 3 days thereafter, notify her in writing, that this has been done and that her discharge will not be used against her in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since August 1, 2006.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 3, 2007

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

<sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge supervisors who refuse to commit actions that would constitute unfair labor practices under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL make whole Linda Cooperman for the loss of earnings she suffered as a result of the discrimination against her.

WE WILL remove from our files any reference to the unlawful discharge of Linda Cooperman and notify her in writing that this has been done and that this action will not be used against her in any way.

THE LORGE SCHOOL